

*United States Court of Appeals  
for the Second Circuit*



**APPELLANT'S  
REPLY BRIEF**



76-7284, 76-7297

---

United States Court of Appeals  
FOR THE SECOND CIRCUIT

---

NAVIEROS OCEANIKOS, S.A.,  
owner of the Liberian Vessel TRADE DARING,

*Plaintiff-Appellant-Appellee*

—against—

S. T. MOBIL TRADER, her engines, boilers, etc., MOBIL OIL  
CORPORATION, the owner of the MOBIL TRADER, and  
MOBIL SALES & SUPPLY CORPORATION,

*Defendants and Third-Party  
Plaintiffs-Appellees-Appellants,*

—against—

TRADE & TRANSPORT, INC.,

*Third-Party Defendant-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

IAN 5 1977

REPLY AND ANSWERING BRIEF OF PLAINTIFF-  
APPELLANT-APPELLEE NAVIEROS OCEANIKOS, S.A.  
AND  
ANSWERING BRIEF OF THIRD-PARTY DEFENDANT-  
APPELLEE TRADE & TRANSPORT INC.

---

POLES, TUBLIN, PATESIDES & STRATAKIS  
Attorneys for Plaintiff-Appellant-Appellee  
and Third-Party Defendant-Appellee  
46 Trinity Place  
New York, New York 10006  
(212) 943-0110

THEODORE P. DALY  
ALAN VAN PRAAG  
Of Counsel

---

## TABLE OF CONTENTS

	PAGE
Reply to Defendants' Statement of the Facts .....	1
The M/V TRADE DARING .....	1
The M/V MOBIL TRADER .....	5
Chronology of Events Leading to the Fire .....	5
 POINT I—	
The Defendants' Answering Brief Virtually Concedes Plaintiff's Specifications of Errors in Point I of the Plaintiff's Opening Brief .....	10
False Expectation .....	10
Lack of Training as Evidenced by Failure to Prevent Overflow .....	12
 POINT II—	
The Trial Court's Finding That the Port and Starboard Diesel Tanks Did Overflow Was Not Clearly Erroneous. (See Point II of Defendants' Brief) .....	13
 POINT III—	
The Finding of the District Court That the TRADE DARING's Fuel Transfer System Was in Compliance With Classification Society Requirements Was Not Clearly Erroneous. (See Point III of Defendants' Brief) .....	19
Captain Halboth .....	21
Doctor Maclean .....	23
Captain Neal .....	25
Cmdr. Cronk .....	27

	PAGE
VALVES .....	29
LEAK TANK .....	30
 POINT IV—	
The Defendants' Argument that Alleged Violations of the Classification Society Standards Constituted a Proximate Intervening Cause of the Casualty Is Invalid Because the Proposed Findings On Which the Argument Is Based Were Rejected by the District Court. (See Point IV of Defendants' Brief) .....	31
 POINT V—	
The District Court's Finding That it Was Chronologically Impossible to Have Completed the Bunkering Operation at 0042 Hours Is Not Clearly Erroneous. (See Point V of Defendants' Brief) ....	33
 POINT VI—	
Defendants' Argument in Point VI of Their Brief for Upholding the Apportionment of Liability Made by the District Court Fails to Address Itself to the Fact That the Apportionment Was Based on Clearly Erroneous Findings and Fails to Address Itself to the Cases and Authorities Set Forth in Point III of Plaintiff's Opening Brief ....	38
 POINT VII—	
Defendants Are Not Entitled To Be Indemnified Against Plaintiff's Damages Proximately Caused by Defendants' Breach of Warranty of Workmanlike Service. (See Point I of Defendants' Brief) .....	42
CONCLUSION .....	49

## TABLE OF AUTHORITIES

Cases:	PAGE
Bisso v. Inland Waterways Corp., 349 U.S. 85, 75 S. Ct. 629 (1955), stated at 349 U.S. 90-91) .....	42, 45, 49
Capozziello v. Brasileiro, 443 F. 2d 1155 (C.A. 2, 1971) .....	43
China Union Lines Ltd. v. A.O. Andersen & Co., 364 F. 2d 769 (C.A. 5, 1966) .....	41
Garner v. Cities Service Tankers Corporation, 456 F. 2d 476 (C.A. 5, 1972) .....	41
Henry v. A/S OCEAN, 512 F. 2d 401 (C.A. 2, 1975) .....	49
Hogeland v. Sibley, Lindsay & Curr Co., 51 A.A. 2d 866 (4th Dept. 1976) .....	48
Levine v. Shell Oil Company, 28 N.Y. 2d 205, 321 N.Y.S. 2d 74, 269 N.E. 2d 787 (1971) .....	45
McDaniel v. The LISHOLT, 155 F. Supp. 619 (S.D. N.Y. 1957), aff'd, 257 F. 2d 538 (Ca.A. 2, 1958), vac., 359 U.S. 26, 79 S.Ct. 602, 3 L. Ed. 2d 625 (1959), on remand, 180 F. Supp. 24 (S.D.N.Y. 1959), aff'd, 282 F. 2d 816 (C.A. 2, 1960), cert. denied, 365 U.S. 814, 81 S.Ct. 694, 5 L. Ed. 694 (1961) .....	32
McLean v. L.P.W. Realty Corp., 507 F. 2d 1032 (C.A. 1974) .....	48
Ratigan v. New York Central Ry. Co., 181 F. Supp. 228 (N.D.N.Y.) (1960), aff'd 291 F. 2d 548 (C.A. 2, 1961), cert. denied, 368 U.S. 891, 82 S. Ct. 144, 7 L. Ed. 2d 89 .....	43
Redding v. Gulf Oil Corp., 67 Misc. 2d 464 (Sup. Nassau 1971) .....	46, 48, 50
Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956) .....	41

	PAGE
Standard Oil & Gas Co. v. Brown, 62 F. 2d 398 (C.A. 5, 1933), cert. denied 39 U.S. 728 (1933) .....	31
The Pennsylvania, 19 Wall 125, 22 L. Ed. 148 (1874) .....	40
<i>Other Authorities:</i>	
41 Am. Jur. 2d, Indemnity, Sec. 15 .....	45
41 N.Y. Jur. Negligence, Sec. 33 .....	32
82 ALR 2d 714 .....	32
57 Am. Jur. 2d, Negligence, Sec. 146 .....	32
17 Am. Jur. 2d, Contracts, Sec. 276 .....	43, 44
17 Am. Jur. 2d, Contracts, Sec. 270 .....	44

# United States Court of Appeals

FOR THE SECOND CIRCUIT

---

NAVIEROS OCEANIKOS, S.A.,  
owner of the Liberian Vessel TRADE DARING,

*Plaintiff-Appellant-Appellee,*

—against—

S. T. MOBIL TRADER, her engines, boilers, etc., MOBIL OIL CORPORATION, the owner of the MOBIL TRADER, and MOBIL SALES & SUPPLY CORPORATION,

*Defendants and Third-Party  
Plaintiffs-Appellees-Appellants,*

—against—

TRADE & TRANSPORT, INC.,

*Third-Party Defendant-Appellee.*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

---

REPLY AND ANSWERING BRIEF OF PLAINTIFF-  
APPELLANT-APPELLEE NAVIEROS OCEANIKOS, S.A.  
AND  
ANSWERING BRIEF OF THIRD-PARTY DEFENDANT-  
APPELLEE TRADE & TRANSPORT INC.

---

## Reply to Defendants' Statement of the Facts

### The M/V TRADE DARING

At page 4 of their Brief, the defendants attempt to lay the basis for their criticism of stationing Third Engineer

Bafaloukos on deck to monitor the inflow of bunkers from the MOBIL TRADER. They assert the proper station is in the lower level of the engine room near the sight glasses. They state: "An attentive watch stander could spot an overflow through sight glasses fitted into the overflow lines . . . Thereafter, speedy and remedial action could be taken to block off further incoming oil by closing either the main intake valve on the main deck or on the third platform deck of the engine room . . . Another alternative would be to reroute the oil to the forward deep tanks . . ."

The defendants' position, quoted above, implies that every routine bunkering operation should be converted into an overflow situation and that the vessel's engineers should routinely halt the flow of bunkers by closing out the system against the pumps of the bunkering vessel after seeing an overflow through the sight glasses located at the lower level of the engine room.

Captain Banks admitted that a vessel would not normally close out against the pumps of the bunkering barge except in an emergency. In ordinary course, the barge should stop bunkering on a signal from the vessel (341a).

With a bunkering barge pumping at over 3 tons per minute, there would be a substantial overflow before the person watching the sight glasses at the lowest level of the engine room could get to the upper level where the main intake valves are located or to the manifold at the main deck. It would take even longer, after observing an overflow at the lowest level in the engine room, to give a signal to the pumpman and have him cut off the flow of bunkers at the barge.

Instead of converting every routine bunkering operation into an overflow and emergency cut-off situation, it makes much more sense to station an engineer on deck to monitor the flow of bunkers into the receiving tanks where he can order the bunkering facility to stop bunkering before an overflow occurs.

The sight glasses are used only to monitor *internal* transfers of bunkers between tanks on the TRADE DARING because the sight glasses are at the same level where the pumps used for internal transfers are located. They are not used to monitor *external* transfers, for the reasons above-stated (Ex. Vol. 226-227).

The defendants' suggestion (Exhibit 57) that the incoming bunkers could have been diverted in an emergency to forward tanks was explored at trial with Captain Neal.

When asked at trial how this diversion could have been accomplished, he said that he could only "guess" (288a). He did not know if this would require opening valves forward, or if there were such valves (289a).

In any case, the District Court apparently concluded that Neal's testimony on this point was so insubstantial or speculative that when plaintiff sought to meet it—for whatever it was worth—with rebuttal testimony from naval architect Doros Argyriadis, the District Court understandably ruled against receiving such rebuttal testimony (405a-406a).

On page 5 of their Brief, defendants refer to "another overflow pipeline system". This is incorrect. What defendants refer to as "another overflow pipeline system" is the save-all system. "As long as the vessel's engines and generators are operating, there will be a steady flow or dripping return into the leakage collection tank that, depending upon the amount, may also go into the overflow double-bottom tanks" (Ex. Vol. 226). The save-all basins are primarily used to draw off water and other impurities from the fuel in the tanks and may also be used to handle overflows from the diesel oil day tanks (Ex. Vol. 226).

On page 5 of their Brief, the defendants, in describing the save-all system, describes it in italics "*as it was originally designed*" as if the save-all system had been subsequently changed in any significant way. They refer spe-

cifically to "hand closure valves" beneath the catch basins, and a "leak tank."

The only change made in the system was that, at some time before the plaintiff purchased the vessel, a manhole cover separating the two large overflow tanks was removed. Originally, the overflow tanks were separated because the vessel was using two types of fuel and overflows or drippings from each type of fuel would be directed into one of the separate overflow tanks. Once the vessel changed to burning a single type of fuel, the separation of the overflow tanks served no purpose (64a, 103a).

The defendants' argument in Points III and IV of their Brief dealing with "valves" and the "leak tank" will be discussed in Point III and IV of this Reply Brief.

The only criticism, prior to trial, made by the defendants of the save-all system, was the thoroughly rebutted charge that the vent system was married to the save-all system as depicted in the cross-shaped intersection in defendants' Exhibit 62 (Ex. Vol. 268). (See Point III, *infra*).

The defendants' statement at page 7 of their Brief, that leaving the valves at the seat of the save-all basins open permitted ignitable gasses and fuel to be transmitted back up the same pipelines in case of overflow from the double-bottom tanks, is also incorrect. The vent lines in the overflow tanks opened at the top of the tanks permitting the gasses above the liquid to be vented. The save-all line leading into the overflow tanks entered near the bottom (131a-132a). With the opening covered by liquid, no ignitable gasses could back up the save-all line when the tanks were in an "overflow" condition (Ex. Vol. 230—"Layout of Systems Longitudinal View"—in lower right quadrant of sketch). The leak tank integrated into the save-all systems was also vented to the open deck (id,—detail "A"—in center of sketch).

### **The M/V MOBIL TRADER**

The defendants' description of the MOBIL TRADER and its appurtenances beginning at page 8 of their Brief is primarily significant for what it omits.

The defendants refer to the port engine of the MOBIL TRADER which is said to be capable of pumping cargo as well as energizing a hydraulic system which raised and lowered the boom supporting the cargo hose. The purpose of the testimony at trial concerning the use of the port engine to raise or lower the boom of the cargo hose, was to circumvent the testimony of pilot Del Greco, as will be discussed, *infra*.

### **Chronology of Events Leading to the Fire**

At page 10 of their Brief, defendants state that the divergence in testimony between the crews of the TRADE DARING and the MOBIL TRADER makes necessary a "dichotomy" in their statement of facts. It would be more appropriate to refer to the divergence in the statements of facts as a "trichotomy", to include the significant differences between the testimony of the MOBIL TRADER's personnel at trial and the statements they gave to Mobil's Marine Counsel, Mr. White, almost immediately after the fire and the testimony given by them at their depositions.

Many of the "facts" stated in defendants' Brief are not only erroneous but also irrelevant to this appeal. Where appropriate, these errors will be discussed in the "Points," *supra*.

At page 11 of their Brief, the defendants state that after Third Engineer Bafaloukos gave the order to the pumpman, the pumpman acknowledged the order (Ex. Vol. 73-74). Defendants apparently agree with plaintiff that the District Court overlooked this testimony. The District Court stated that the order was not acknowledged (10a).

See page 15 of plaintiff's opening Brief and also Point I of this Reply Brief.

The defendants also state that Third Engineer Bafaloukos did not wait to see that his order was carried out. This suggests that he was required to supervise or oversee the "experts" who were supposedly performing the bunkering even after they had acknowledged his order. There is no testimony to support any such conclusion and the defendants have cited none. Further, he would not close the main intake valve on the bunkering manifold on deck after giving the order, since the cargo hose should be "blown" and permitted to drain, as defendants' own witnesses acknowledged (155a).

The defendants, in reciting the chronology of events after the overflow was discovered by Third Engineer Bafaloukos, describe the events in a "foot dragging" style so that it would appear that a significant amount of time elapsed between the discovery of the overflow at 0050 hours and the time various procedures were followed by Third Engineer Bafaloukos and Second Engineer Spetsiotis in closing the main intake valve on the third level of the engine room and the intake valve on the manifold on the main deck. The fire occurred at 0052 hours, as the District Court found (9a-10a). As can be seen even from the defendants' description at page 11-12 of their Brief, a great deal was accomplished between the discovery of the overflow at 0050 hours and the fire at 0052 hours; it must have been accomplished quickly. Third Engineer Bafaloukos, during this two-minute interval, did the following:

1. Observed the overflow at 0050;
2. Ran up the engine room ladder to the deck;
3. Called out to the Second Engineer, whom he met on his (Bafaloukos') way up and advised him of the overflow;

4. Ran on to the main deck; and shouted to the Master on the boat deck to tell the pumpman on the barge to stop pumping;
5. Called to the pumpman to stop pumping;
6. Closed the main intake valve at the bunkering manifold which was forward of the exit from the engine room to the main deck;
7. Crossed the main deck and went aft to return to the engine room to find oil gushing up through the drains of the save-all catch basin;
8. Received instructions from the Second Engineer to shield the electric generator on the lower platform from the cascading overflow;
9. Threw a raincoat over the electric generator as instructed;
10. Received an order from the Second Engineer to shut out the electric generator;
11. Was attempting to shut out the generator when the fire erupted at the generator at 0052 hours.

These times given by Third Engineer Bafaloukos were very close approximations, "approximate by a half minute", determined according to the engine room clock and his watch which was within half a minute of the time on the engine room clock (Ex. Vol. 107-109). It is also apparent that Second Engineer Spetsiotis had accomplished a great deal during that time interval. He had not only closed the main intake valve on the third platform, below decks, but had advised the Master of a problem in bunkering by telephone and was supervising the attempt to prevent the overflow from the save-all system from igniting the generator (Ex. Vol. 131-134).

At page 12 of defendants' Brief, the conversation between the Master and Second Engineer Spetsiotis is said

to seem "improbable because Bafaloukos testified that the Master was on the deck ordering the pumpman of the TRADER to stop transfer operations." Defendants apparently overlooked the fact that on the preceding page (page 11 of their Brief) they had indicated that Bafaloukos had testified that when he ran on deck and shouted to the Master, the Master was on the "*boat deck* of the midships house" (emphasis ours) which is just above the bridge, and not on the *deck*. (Exhibit 12.) The Master's testimony confirms that after he ordered the pumpman to stop pumping at 0050 hours, he then went to the bridge and called the engine room by telephone, and then came back to the boat deck (Ex. Vol. 198-199). Considering the proximity of the boat deck to the bridge, there was nothing "improbable" about the conversation at all, except that defendants should confuse the "deck" with the "boat deck".

The defendants state at page 12 of their Brief that: "It is not known why the Court below made special mention of pilot Del Greco's deposition testimony, since this testimony could not possibly have supported plaintiff's contention that Milano continued pumping after 0042 hours." The importance of pilot Del Greco's testimony is clear if one bears in mind the following:

Milano and Banks had testified by deposition *before* pilot Del Greco testified in December, 1974. Del Greco testified that when he boarded the TRADE DARING shortly after 0050 hours, he saw the hose surging and heard the engine. Milano's testimony at trial, that he had started up the port engine to lift the cargo hose boom, was designed to meet pilot Del Greco's testimony.

No mention of Milano's starting up the port engine had been made in the interviews by Mobil's Marine Counsel, Mr. White, or by Captain Banks in his testimony (Trial Transcript at page 382). Plaintiff offered Milano's deposition to show that Milano failed to mention starting up the port engine in the testimony he gave before Del Greco's

deposition. The plaintiff offered the deposition to prove that the witness was asked at his deposition to specify the step-by-step actions he took over a period of time at or about the time the order to "stop bunkering" was given and that it was highly improbable that he could have started up the port engine as he claimed at trial. The District Court refused to admit Milano's deposition (See footnote at page 8 of plaintiff's opening Brief).

Plaintiff has never asserted, as defendants state at page 13 of their Brief, that the pumpman of the MOBIL TRADER continued to pump cargo after the second order was given to him to stop pumping by the Master and Third Engineer of the TRADE DARING. What pilot Del Greco reported seeing moments before the fire was consistent with what the Third Engineer reported, namely: that after the order was given the second time, the pumpman closed some valve on deck (apparently the line from which cargo was being drawn by the pump) and slowed down the engine (Ex. Vol. 78). What Del Greco apparently saw was the line surging because air was being blown through it. This testimony coming from two sources (Third Engineer Bafaloukos and independent pilot Del Greco) completely destroys Milano's testimony that he shut off the pump engine after receiving the second order from the TRADE DARING to stop pumping. Hence, the belated testimony of the "second engine" by defendants' pumpman. Of course, even the "second engine" testimony does not explain why the hose between the MOBIL TRADER and the TRADE DARING was surging.

The reason the line was clear of oil (if indeed it was) at the time Milano broke the connection, as defendants state at page 13 of their Brief, was that he had not been pumping oil up to the time of the fire but had, at 0050 hours according to the above testimony, probably closed the line between the pump and the cargo tank on the MOBIL TRADER leaving the pump engine going, thus allowing time for the line to be blown clear.

On pages 14 through 16 of the defendants' Brief, the defendants make a virtual concession the District Court's finding of contributory fault against the TRADE DARING for creating a "false expectation" in the mind of the pumpman by ordering more bunkers than the vessel would take. This will be discussed in Point I, immediately following.

## POINT I

### **The Defendants' Answering Brief Virtually Concedes Plaintiff's Specifications of Errors in Point I of Plaintiff's Opening Brief.**

The District Court, after holding that defendants had breached their warranty of workmanlike services, concluded that the plaintiff was guilty of two contributory faults (14a).

#### ***False Expectation***

One of these alleged contributory faults was that in ordering more bunkers than the TRADE DARING required, the TRADE DARING created a "false expectation" in the mind of pumpman Milano. Plaintiff, in Point IA of its opening Brief, argued that this conclusion was not only without foundation in the evidence but was contradicted by clear, unequivocal testimony elicited on cross-examination from defendants' own witnesses. See pages 22-26 of plaintiff's opening Brief.

The defendants concede at page 15 of their Brief that: "The proof at trial was that it is a common practice in the industry to return to the loading terminal with cargo that cannot be delivered." Nowhere in the Brief do the defendants make any attempt to meet the demonstration in plaintiff's Brief that the trial Court's finding of a "false expectation" was simply wrong.

Attempting to make the best of a bad situation on the facts, defendants seek to turn the argument around to argue

that "shut outs" of cargo are so common that it is unreasonable to believe that Milano would not have immediately obeyed the order. Unfortunately, marine and industrial accidents that should never have occurred do occur with alarming frequency, as the volume of maritime litigation in this Court would confirm.

It is not for plaintiff to speculate why defendants' personnel failed to stop bunkering when ordered to do so at 0042 hours. They had been on duty for some 17 hours (348a). Captain Banks, who was in charge of the MCPIL TRADER, was apparently asleep during the latter stages of the bunkering (327a-328a). He had probably prepared the delivery receipt in advance, anticipating complete delivery as the date and times on the delivery receipt, in spite of the unexplained alterations, would seem to indicate (9a, 12a). If delivery was not completed, it would have been necessary to ullage the tanks, take the temperatures, make the calculations and prepare the paper work to reflect the actual amount of bunkers delivered. It was nearly one o'clock in the cold morning of mid-March. Perhaps it was thought by pumpman Milano that the TRADE DARING, a large vessel, could hold whatever bunkers remained to be delivered after the order was given at 0042 hours to stop bunkering.

There are various possible factors that might have influenced or impaired the judgment of defendants' personnel at the time. What is known, and is above argument or speculation, is that an order was given to stop bunkering at 0042 hours, and that Milano's testimony, that he had already completed bunkering by that time, cannot be accepted. It was "chronologically impossible."

One other significant thing is known, and is above argument or speculation: defendants' pumpman's failure to carry out the order to stop bunkering could not be reasonably attributable to any "false expectation" created by the quantity of bunkers ordered.

***Lack of Training as Evidenced by  
Failure to Prevent Overflow***

The other alleged contributory fault on the part of the plaintiff was the alleged failure of the Owner of the TRADE DARING to have trained its personnel "as evidenced by" the engineer's failure to close the main intake valves on deck or in the engine room in sufficient time to prevent the overflow. See Point IB of plaintiff's opening Brief.

The District Court stated that (10a): "However, after he [Bafaloukos] gave the signal and without waiting to see if the order to stop bunkering had been executed *or indeed acknowledged* he left his post . . ." (Emphasis ours). The undisputed testimony is that after Bafaloukos told the pumpman by voice and hand signal to stop bunkering, the man on the MOBIL TRADER answered "Okay" (Ex. Vol. 73-74). At page 11 of their Brief, defendants concede that this was the testimony. Nowhere do they challenge this testimony and the testimony seems inherently credible and probable in the circumstances.

This misreading of the record by the District Court had various consequences. It seems only natural that a ship's officer who had received acknowledgment of his order should not have to supervise its execution by a supposedly qualified seaman or bunkering expert. If we posit the acknowledgment of the order, the criticism that he did not stay to see it carried out becomes gratuitous.

The other clear error of fact in the District Court's opinion on which the ultimate conclusion of fault above-stated appears to be based is discussed in Point IB of plaintiff's opening Brief at pages 26-28.

The District Court had stated in its opinion (12a): "The Daring was equipped with valves at the bunkering manifold and in the engine room which would have permitted the third engineer to shut off the bunkering. *These were*

*not used even after the overflow was evident."* (Emphasis ours). This is simply wrong.

The steps taken to shut off these valves after the overflow became apparent were discussed in the plaintiff's opening Brief in the "Facts" and in Point IB. Nowhere in their Brief did the defendants attempt to challenge the fact that both the valve at the manifold on deck and in the engine room were closed almost immediately after the overflow was discovered the timing was criticized.

The two (and only two) findings of acts of contributory negligence which the District Court held justified a reduction of 75% in plaintiff's award for damages were "clearly erroneous." They were contrary to, or rather contradicted by, the evidence; and even the defendants have not attempted to support those findings.

## POINT II

### **The Trial Court's Finding That the Port and Starboard Diesel Tanks Did Overflow Was Not Clearly Erroneous. (See Point II of Defendants' Brief)**

Defendants, after the trial, claimed that the port and starboard side tanks did not overflow; that it was the starboard gas-oil tank that overflowed.

There is absolutely no evidence of this. None of the defendants' experts or other witnesses suggested it. It is not alleged or even remotely suggested in defendants' "Disputed Proposed Findings of Ultimate Facts" \* submitted to the District Court shortly before trial. It is not

---

\* This matter was processed for trial in accordance with procedures prescribed by the Honorable Milton Pollack of the United States District Court, Southern District of New York, including the submission of "Undisputed and Disputed Proposed Findings of Ultimate Facts," consisting of agreed facts, proposed findings and counter-proposed findings.

developed in the prepared testimony of the expert witnesses submitted in advance of trial.

How did this novel argument of the defendants' come about?

At trial, Dr. Maclean testified that he had examined Exhibit 62 (the diagram which he mistakenly thought was prepared under guidance of Captain Halboth), had reviewed Captain Halboth's survey report (Exhibit 61), and that he had consulted with Captain Halboth in connection with this matter and that they "met and discussed almost every aspect we can think of" (115a-116a, 135a-136a).

Dr. Maclean was questioned closely about two paragraphs in the preamble of Halboth's report (Exhibit 61) which, in effect, sets forth the basic facts developed through the testimony of the plaintiff's witnesses or provided by their representatives. He had also reviewed the testimony of the crew and Third Engineer Bafaloukos' testimony in particular (178a, 116a-118a). He was asked on cross-examination at trial as follows (118a):

"Q. In reading Captain Halboth's report, did you see anything in his report by way of comment on the physical evidence, on his observations, by way of conclusions or opinions in any way inconsistent with the two paragraphs I just read?"

A. Not that I know of."

To state it simply: Dr. Maclean admitted that the statements of the ship's crew, as reflected in the preamble of Halboth's report, were totally consistent with the physical facts observed by the defendants' surveyor Halboth after the fire.

When Dr. Maclean returned to the stand *after a recess for the afternoon session*, defendants' counsel on redirect examination almost immediately plunged into the subject

of Captain Halboth's report in an attempt to generate some inconsistency between Captain Halboth's findings and the recitation of facts provided by plaintiff's personnel as set forth in Captain Halboth's report (156a-157a).

Dr. Maclean purported to find such inconsistency, namely, that the ullages taken or estimated by Captain Halboth two weeks after the fire (Ex. Vol. 263) indicated that the levels of bunkers in the side tanks in which overflows had occurred were below the levels of the overflow pipes in those tanks (160a-161a). Ergo, there had been no overflow.

The cross-examination of Dr. Maclean on this "inconsistency" demonstrated that, in his haste to develop this "inconsistency", he had failed to take into account a most significant factor, namely: the increases in temperature of the fuel oil resulting from the fire. The increase in temperature would have caused a considerable expansion of the fuel in the tanks to the height of the overflow pipes, and that after the cooling of the liquid, its volume would naturally shrink or contract so that one would expect to find it below the level of the overflow pipes (173a-174, 177a). On rebuttal, Argyr'adis, the naval architect, testified that he had made the necessary calculations based on his estimate of the increases in temperature of the bunkers in the side tanks resulting from the fire and in his opinion the explanation for the difference between the level of the bunkers observed by Halboth long after the fire and the level of the overflow lines was the increase in temperature of the fuel oil in those tanks (403a-404a). It should also be noted that there was, in addition, a definite leakage from the port side tank apparently resulting from damage to the integrity of the tank (Ex. Vol. 263 in concluding paragraph).

In any event, Bafaloukos testified not only that he had "filled the gas-oil tank" which implies that he had closed off the valve, but specifically testified when asked: "Did

you shut off the valve?", answered: "Yes, of course." (Ex. Vol. 69).

Considering that the gas-oil tank to which defendants refer was one of the smaller tanks and was reported as filled at about 0015 to 0020 hours (Ex. Vol. 70), defendants' speculation would entail the conclusion that the bunkers were pouring out of the save-all basins for almost one-half an hour before the fire—a ridiculous assumption. To put it another way, if the gas-oil tank was filled at 0020 hours, the overflow would have poured into the engine room about seven minutes later by which time the capacity of the overflow tanks would have been exhausted. The overflow tanks have a combined capacity of approximately 23.2 tons and would be filled in less than 7 minutes.

The ullages taken by surveyor Halboth two weeks after the fire were only *estimates* (Ex. Vol. 263—see "(est)" following ullages of side tanks). Further, one of the tanks (the port side diesel tank) had been more severely damaged by fire and was leaking (Ex. Vol. 263—last paragraph on page). Thus defendants' claim at page 25 of their Brief that: "It was virtually impossible for each tank to displace the same difference in height of oil due to heat expansion and contraction," is completely undercut. No one can say precisely what difference was caused by leakage in the port side tank or by expansion and contraction.

Second, the argument that pumping for 8 minutes from the time the order to stop pumping was given would not cause the side tanks and the overflow tanks to be filled, is faulty in its premises. Defendants state that when the order to stop pumping was given by Third Engineer Bafaloukos, fuel oil was at the second rung of the ladder in the tanks. This, of course, was only an "eye" approximation, but accepting this as entirely correct, the second rung of the ladder was only 20 inches below the tank top, not 30 inches (2.5 feet) as stated in defendants' Brief at page 22.

It is significant that to establish the 2.5 feet distance of the second step from the tank top, defendants resort to a photograph (Ex. Vol. 1 [Plaintiff's Exhibit 31]) from which no measurements can be taken instead of the vessel's plans from which rather precise measurements can be taken. See ladder with 11 spacings labelled "ROHRKANAL" in upper mid portion of Exhibit 54 and rectangle in which figure "99" appears in Exhibits ~~15~~ and ~~16~~. This indicated the TRADE DARING's vertical access ladders (at least this ladder) had rungs approximately 10 inches apart.\*

It is possible, however, by analysis of the admitted or unchallenged facts to demonstrate that pumping from 0042 hours to 0050 hours was more than sufficient to fill the side tanks to overflowing and to fill the overflow tanks by establishing the (a) correct distance between the second rung of the ladder and the top of the tank; and (b) the distance between the second rung of the ladder and the lower lip of the overflow pipe.

1. The testimony was that the overflow pipe was between the first and second rungs of the ladder "about one and a half steps" (Ex. Vol. 174).
2. The lower lip of the starboard side tank's overflow pipe was 18 inches (1' 6") below the top of the tank. Defendants admit this (Ex. Vol. 368; Ex. Vol. 6).
3. The overflow pipe as confirmed by Captain Halboth's testimony is 6 inches in diameter (216a). Therefore, the center or midpoint of the cross section of the overflow pipe is 15 inches below the tank top (3 inches above the lower lip of the overflow pipe).

---

\* Defendants' calculations were not made by any expert at trial and this argument was developed by defendants only after trial. Thus, the plaintiff's rebutting arguments are necessarily pieced or drawn together from various sources.

4. Since the midpoint of the overflow pipe is 15 inches below the top of the tank and is also midway between the first and second rungs, then each step was 10 inches. (One and one-half steps = 15 inches; therefore, one step = 10 inches.) Thus, the second step is 20 inches below the tank top—not 30 inches (2.5 feet)\* as stated on page 22 of defendants' Brief.
5. Thus, if the lower lip of the overflow line in the starboard side tank was 1' 6" (18 inches) below the level of the tank top as plaintiff concedes, the second step (which is 20 inches below the top of the tank) would be only 2 inches below the outlet.
6. Converting this 2" height difference in levels between the second rung of the ladder and the overflow pipe to reflect the cubic capacity it represents shows that it would equal approximately 1.4 cubic meters (Ex. Vol. 6).
7. The inlet in the port side tank is even lower 19 $\frac{1}{2}$  inches (1' 7 $\frac{1}{2}$ ") (Ex. Vol. 368) and the distance between the second step of the ladder and the outlet would be only  $\frac{1}{2}$  inch. This difference in levels equates to a volume of .2 cubic meters (Ex. Vol. 5).
8. Thus, the combined volumes representing the capacity of both tanks between the second rung of the ladder and the overflow pipe would thus be 1.6 (1.4 plus .2) cubic meters.
9. Applying the conversion factor for converting cubic meters to long tons: 1.6 cubic meters of fuel oil equates to 1.4 long tons (see note in center left

---

\* If the second rung of the ladder was 30 inches below the top of the tank, the first rung at 15 inches below the top would be squarely athwart the overflow pipe whose center or midpoint is 15 inches below the top of the tank.

of diagram at Ex. Vol. 230, stating this conversion factor as 0.8665).

10. This means that the 26.6 tons pumped in 8 minutes would exceed the capacity of the overflow tanks (23.2 tons)\* and the combined capacities of both side tanks between the second rung and the overflow pipes (1.6 tons).

The defendants are attempting to overturn a finding of the District Court on the basis of theories that were never developed by defendants' experts at trial. Fortunately, there is sufficient evidence in the record to dispose of these theories.

### POINT III

#### **The Finding of the District Court That the TRADE DARING's Fuel Transfer System Was in Compliance With Classification Society Requirements Was Not Clearly Erroneous. (See Point III of Defendants' Brief)**

In Point II of their Brief, defendants argue that the District Court erred in finding that the TRADE DARING's fuel oil overflow and save-all systems were in compliance with the American Bureau of Shipping's classification standards.

The District Court found that the TRADE DARING was in compliance with the American Bureau of Shipping's classification requirements (6a-7a). In making this finding the District Court had in support thereof:

---

\* The overflow tanks would not have been absolutely empty. While the vessel's engineers attempt to keep the overflow tanks relatively empty, there is a continuous flow of returns and drippings from the engines and generators into the overflow tanks (Ex. Vol. 226). While the volume of these returns would be relatively small, there is no testimony that they were absolutely empty at the time of the bunkering (Ex. Vol. 112).

1. Records of the American Bureau of Shipping that had been made available to defendants long prior to trial, with a report of the most recent survey less than three weeks prior to the fire indicating the TRADE DARING fully in class (Ex. Vol. 25, *et seq.*).
2. Testimony at trial of naval architect Argyriadis who had attended on board the vessel numerous times before and after the fire and was well acquainted with its fuel oil system (Ex. Vol. 221, *et seq.*).
3. The TRADE DARING's official plans approved by the vessel's classification society (Exhibits 34, 54, 7 and 8).

The defendants' post-trial criticism of the fuel tank system was a radical departure from the allegations made in the detailed "Undisputed and Disputed Proposed Findings of Ultimate Facts" submitted just prior to trial. Prior to trial, the defendants had alleged that the TRADE DARING's tank venting system had been "compromised" by reason of an alleged connection or marriage of the vent line from the overflow tanks and the save-all line from the save-all basins. This connection is depicted in Exhibit 62 (Ex. Vol. 259). This connection was supposedly established by Surveyor Halboth (Ex. Vol. 269), and taking this "connection" as a fact, defendants' expert Maclean claimed the connection violated classification society rules (Ex. Vol. 345). When this "connection" was demonstrated at trial to be non-existent (394a-396a), defendants switched their argument to claim that the save-all system was improper for other reasons. This later theory, put together on short notice, is understandably tenuous and often internally inconsistent. This theory is that the original construction of the TRADE DARING was modified and that the "valves" under the save-all basins and "leak tank" in the save-all system were not in place at the time of the fire.

It is submitted that, to the extent defendants rely on the testimony of Halboth, Neal, Maclean and Cronk to sustain their argument, the District Court had ample reason to reject their testimony in whole or in part or to find that their testimony simply did not support the defendants' argument.

***Captain Halboth***

1. Halboth stated in his survey report dated July 14, 1971 that he "did, on April 1, 2, 3, 13, 15, 21, 27, and June 23, 1971 . . . survey the M/V "TRADE DARING" . . . whilst lying afloat at Bethlehem Steel Corporation . . ." (Ex. Vol. 260). However significant the recital of surveys on those 8 dates may have been for Captain Halboth's purposes, he admitted at trial that he had only attended on the TRADE DARING on two dates: April 2 and April 27, 1971 (199a-200a).

2. Captain Halboth at trial attempted to explain away discrepancies between his testimony and his report by stating (239a):

"Q. Well, if you can answer the question without reading it, fine. If not, perhaps the Court—

A. I cannot sir. I again invite your attention to the fact that I prepared this report over four years ago or approximately four years ago.

*I have not made a detailed study in preparation for this trial in any way shape or manner. I am here to testify and to offer my report, and that is all.*" (Emphasis added).

Elsewhere, Captain Halboth had testified (199a):

"A. In preparing for my testimony today, sir, I have reviewed my report and the notes contained in my file which I have brought with me."

Dr. Maclean had quite a different view of his own and Captain Halboth's preparation for the trial. Dr. Maclean testified (115a-116a):

"Q. In addition to examining this diagram and this report, that is, the document marked Exhibits 62 and 61, have you actually consulted with Captain Halboth in connection with this matter?

A. Yes, *we have met and discussed almost every aspect we can think of.*" (Emphasis added).

See also Dr. Maclean's later testimony at 117a-118a.

3. While surveyor Halboth testified at trial that his survey report was prepared without being advised of the testimony of the crew of the TRADE DARING taken in April, 1971 (209a), a close reading of his lengthy report shows that some of his facts were expressly "per crew testimony" (Ex. Vol. 266 in 4th paragraph from bottom of page).

4. Surveyor Halboth purported to show on his sketch (Ex. Vol. 259) a connection between the save-all line and a vent line. After great reluctance on cross-examination to locate the connection, he finally testified that this connection was "on an order of magnitude basis" 12 feet above the floor plating in the engine room (234a-236a). He had indicated that the save-all line ended at the point it joined the vent line (Ex. Vol. 259). However, a photograph of the save-all line shows that it runs its independent course toward the overflow tanks and is visible at a height barely above floor level (Exhibit 4; 394a-395a). Dr. Maclean admitted that, as shown in the official drawings of the TRADE DARING, the vent line from the overflow tanks does not even proceed up through the center of the engine room but runs horizontally to the "skin of the ship" and then proceeds upward (120a). It is nowhere in the vicinity of any save-all line (394a-395a). In his survey report, con-

trary to the sketch he exhibited, surveyor Halboth had stated that the vessel was fitted with the "requisite vent lines" (Ex. Vol. 262). No mention is made in his report of an improper connection of the vent line from the overflow tanks and the save-all line such as is exhibited in his later sketch (Ex. Vol. 259) or the drawing prepared by defendants' counsel (Ex. Vol. 268; 196a).

5. At the times Halboth was aboard the TRADE DARING, the overflow tanks and the leak tank, which are below the floor plate level, were covered by oil and debris and were not visible (Ex. Vol. 55; Exhibit 54; 84a, 396a-397a).

Not only was Captain Halboth's testimony self-contradictory and, in some cases, clearly at variance with the facts, he was also not competent from a professional point of view to have fully understood the significance of his observations. His sea-going background was primarily in the deck department of vessels (221a), and particularly in the field of marine salvage (183a-184a). His major experience had been in the area of "plain and simple marine surveying" (211a). He had no experience in the operation of diesel power plants on major sea-going vessels (210a-211a).

#### **Doctor Maclean**

Virtually all of Captain Maclean's direct testimony was based on the erroneous assumption that there was a direct connection between the vent system and the save-all system of the TRADE DARING. His criticism was set forth in his direct testimony (Ex. Vol. 345) as follows:

"The vent piping system was compromised on the M/V TRADE DARING because inflammable gases and fuel were able to vent into the engine room. The reason for this is because the vent pipeline was *directly connected* up with the save-all pipeline. Any gases or oil moving through the vent line would branch off through the save-all piping and find egress through the open

drain and open basins before the gases or oil had an opportunity to vent to the atmosphere. It was definitely not a closed system . . ." (Emphasis ours).

Maclean used as the basis for his criticism of the TRADE DARING's venting system an exhibit that seemed to him to be of dubious parentage (Ex. Vol. 268). He thought that perhaps Mr. Halboth and Mr. Juliano had prepared it (115a). It had actually been prepared by defendants' counsel (196a). Captain Halboth denied working with defendants' counsel in preparing this exhibit (201a).

This questionable drawing (Exhibit 62; Ex. Vol. 268) on which Dr. Maclean relied was in direct conflict with the official and approved vent plan of the TRADING DARING (Exhibit 34) produced well in advance of trial in accordance with pre-trial procedures. He admitted that Exhibit 62 was wrong in several important respects (214a, 217a).

It is obvious that it would have been difficult for defendants to obtain the testimony of Dr. Maclean criticizing the vessel's vent system on the basis of the discredited sketch (Exhibit 62) if he had been given the official, approved plans of the vessel for examination before his prepared testimony was submitted. Once he had committed himself to the defendants in his prepared testimony, retraction was difficult.

He was the only witness produced by the defendants who had any competency at all in reading and interpreting these official plans of the TRADE DARING. He, if anyone, should have been given access to them.

Dr. Maclean was also not apprised of other evidence that might have caused him to question Exhibit 62. Cmdr. Cronk's sketch (Ex. Vol. 234) and his testimony indicated no such connection between the vent system and the save-all system as represented in Exhibit 62 (Ex. Vol. 248-250). Dr. Maclean was not shown Cmdr. Cronk's sketch and was

not given the benefit of Cronk's deposition testimony (122a).

Apparently, no one in defendants' camp wanted to confuse Dr. Maclean by the facts.

As Dr. Maclean moved toward the conclusion of his testimony on the subject of the vent system, he was obviously having second thoughts about his testimony and it requires no great empathy to conclude that Captain Maclean felt he had been used. He testified at one point as follows (135a-136a) :

"Q. And all of your testimony, Doctor, is based on the premise that the vent line and the save-all line are married at some point, is that correct, or connected as shown in Exhibit 62?

A. The premise, I believe, of the testimony that has been submitted here is on the basis that those connections exist. I'm not exactly sure whether there is anything in this at all. I don't think there is anything in here at all that refers to this. I don't think I saw this until after this was already prepared.

\* \* \*

... I don't believe I ever saw Exhibit 54 [Official Fuel Transfer Piping Plans] until my testimony had been prepared."

Dr. Maclean's final testimony (120a) on this point is in complete agreement with naval architect Argyriadis' testimony (394a-396a) concerning the location and the path of the vent line.

#### ***Captain Neal***

A reading of Captain Neal's testimony would indicate quite plainly why the Court would have been reluctant to accept the reliability of Captain Neal's testimony in any respect.

Captain Neal's prepared, direct testimony was directed *entirely* to establishing that the M/V TRADE DARING's fire-fighting system was in violation of requirements of the Safety of Life at Sea Convention, the rules of the classification societies and the U. S. Coast Guard and that the fire-fighting operations of the personnel of the TRADE DARING in fighting the fire were improper or negligent (Ex. Vol. 354-364).

Captain Neal's testimony on cross-examination was a disaster for the defendants and it is significant that the defendants on appeal have made no attempt to overturn the findings of the District Court with respect to the seaworthiness of the TRADE DARING and her fire-fighting equipment and the propriety of the actions of the vessel's personnel in fighting the fire (7a, 10a). All of his criticisms were withdrawn or rebutted by documentary evidence (258a-271a).

It is submitted that the District Court's rejection of Captain Neal's testimony, in whole or in part, was not "clearly erroneous".

The District Court, in its ultimate judgment on the credibility of Captain Neal's testimony, may also have been impressed by the following:

1. Defendants' failure in their answers to interrogatories to disclose Captain Neal's investigation of the fire or to give any reason for their failure so to disclose (47a-48a).
2. The disappearance, reappearance, and final disappearance of Captain Neal's original notes of his investigation of the fire on the TRADE DARING (247a-249a).
3. The mysterious surfacing of a typewritten report purportedly based on Captain Neal's notes shortly before the trial (249a).
4. Mr. White's inability to recall Captain Neal's oral report to him (45a-46a), taken in light of Captain Neal's

testimony that he had discussed the matter at length with Mr. White and was told by Mr. White that he did not want Captain Neal's notes (249a).

***Cmdr. Cronk***

Approximately a week after the fire (Ex. Vol. 238) as investigating officer of the United States Coast Guard, Cmdr. Cronk attended on board the TRADE DARING to conduct an informal investigation to determine the cause of the fire. It was not the formal investigation authorized by the Code of Federal Regulations where witnesses are sworn and parties in interest may be in attendance (Exhibit 58 at pages 37-38).

As a result of the fire in the engine room, "the bilges up to the floor plates level were full of oil, water, debris and ash, etc., which had coagulated into a solid mass and was impossible to pump" (Ex. Vol. 55). This condition continued at least into April, 1971 (396a-397a).

Therefore, at the time of Cmdr. Cronk's inspection, the overflow tanks and the leak tank, below the level of floor plates, were not visible. (Ex. Vol. 55; 84a, 396a-397a).

In the course of his investigation, he observed the fuel and vent systems of the TRADE DARING (Ex. Vol. 239). The vent lines "appeared to be normal vent lines, standard vent lines" (Ex. Vol. 248). He did not attend on board the MOBIL TRADER although he did have some conversation with its personnel (Exhibit 58 at page 32). At the time of Cmdr. Cronk's testimony, more than 4 years after his investigation, he had no notes to refresh his recollection to identify the persons with whom he had spoken in the course of his investigation (Exhibit 58 at pages 21-22, 32).

Cmdr. Cronk was not the usual government witness who is deposed by a private party. Prior to the deposition he had not only been prepared for direct examination but for questions defendants' counsel thought likely to rise on

cross-examination (Exhibit 58 at page 49). Cmdr. Cronk initially testified that he had been shown only two diagrams, his own sketch (Ex. Vol. 234) and plaintiff's expert's drawing (Exhibit 52A) (Exhibit 58 at page 19). He later admitted that prior to his deposition, defendants' counsel had written a letter enclosing documents to refresh his recollection (Ex. Vol. 225; Exhibit 58 at page 44). One of the documents enclosed appeared to be Exhibit 62, the exhibit prepared by defendants' counsel (196a). This document, as noted, appeared to be Exhibit 62, and was produced at his deposition by Cmdr. Cronk along with the covering letter of June 12, 1975.

Counsel for plaintiff insisted at the deposition that Cmdr. Cronk provide a copy of the enclosures to the letter of June 12, 1975 (Ex. Vol. 254). Counsel for defendants represented that there was no necessity for reproducing the enclosures since the enclosures were already marked as trial exhibits (Exhibit 58 at pages 45-46, Ex. Vol. 254-255). However, a close inspection of the actual exhibit or document that was sent by defendants' counsel (Exhibit 56) to Cmdr. Cronk indicates that on that exhibit there is no marking of any valves below the save-all basins while on the exhibit produced for trial there were markings which purport to be such valves (198a, 201a-202a). Cmdr. Cronk stated that he had not noticed any valves in the save-all lines (Ex. Vol. 242, 246). The exhibit provided to Cmdr. Cronk by defendants' counsel prior to his deposition obviously "refreshed" Cmdr. Cronk's recollections of, among other things, the non-existence of these valves. It is doubtful that Cmdr. Cronk's recollection would have been so "refreshed" if defendants' counsel had also given Cmdr. Cronk the benefit of the vessel's official plans which were available at the time of Cmdr. Cronk's deposition (Exhibit 54). A close examination of Exhibit 62 (Ex. Vol. 268) seems to indicate that the valves or dots representing valves under the basins, were added as an afterthought.

The net effect of Cmdr. Cronk's testimony is that he did not remember seeing valves in any of the save-all lines\* although defendants' other witness (surveyor Halboth) and defendants' exhibits do indicate valves beneath at least some of the save-all basins.

### VALVES

In summary, the defendants' evidence concerning the non-existence of the valves beneath the save-all basins is contradictory: Halboth and defendants' exhibits indicate at least *some* valves; Cmdr. Cronk after having his recollection "refreshed" by a misleading exhibit indicates *no* valves. Neal's original testimony made no mention of valves at all.

The existence or non-existence of these valves is, in a sense, "red herring", since these valves would in any case be left open in normal operation to permit the flow of drippings or leakages from the save-all basins ultimately into the overflow tanks. To close the valves and thus use these save-all basins as collecting points for combustible liquids and vapors would not be a safe practice.

Naval architect Argyriadis testified as follows (75a):

"A. The valves over here would be primarily for closing them when you want to wash out the basin. Normally they would be open. Any drippings out of the filters which would be oil, would go through\* the leakage tank.

---

\* Some confusion might have resulted from the fact that the witnesses (Cronk and Second Engineer Spetsiotis) were asked whether there were any valves "in that line" (Ex. Vol. 242) or "in the scupper lines" (Ex. Vol. 158). Strictly speaking, the valves depicted are not "in the line" and were not used to control the movement of drippings through the line but were used to isolate basins when they were being cleaned.

Q. So then with this system, as you have described it, you said it is normal to keep the valves at the bottom of the drain open?"

A. Yes, sir."

### LEAK TANK

In summary, none of the defendants' percipient witnesses saw the leak tank because, at the time of their inspections, it was not visible.

The defendants' position in arguing the non-existence of the "leak tank" is also gratuitous.

It should be kept in mind that the leak tank was in no way intended to be a safety factor or to insure safe operation. As naval architect Argyriadis testified, a system without a leak tank would be perfectly safe and proper (78a). He himself had designed save-all systems without any leak tank built in (105a-106a). The purpose of the leak tank was to take the comparatively small leakages from the main engine, generators, and filters, giving the crew the "option" of either allowing them to go eventually to the overflow double bottom tanks or to send them to other systems for burning (87a).

In normal course, the valves at the valve chest between the leak tank and the overflow tanks were left open "for safety precautions in case of overflow of the leakage tank" (105a).

The District Court rejected the defendants' claim that the TRADE DARING was in violation of classification standards. That finding, based upon "live" testimony and confirming documentary evidence, was not "clearly erroneous."

#### POINT IV

**The Defendants' Argument that Alleged Violations of the Classification Society Standards Constituted a Proximate Intervening Cause of the Casualty Is Invalid Because the Proposed Findings Which the Argument Is Based Were Rejected by the District Court. (See Point IV of Defendants' Brief)**

Defendants in Point IV of their Brief argue that since the TRADE DARING was in violation of classification society standards, as they argued in Point III of their Brief, such violation constituted a proximate intervening cause that was not reasonably foreseeable by defendants.

It follows that since defendants' major premise (Point III of their Brief) is wrong, their conclusion (Point IV) is invalid. See Point III of this Reply Brief, *supra*.

It is respectfully submitted that defendants' extremely narrow view of the meaning of "foreseeability", as stated at pages 32-34 of their Brief, is particularly inappropriate in a case where the underlying wrong of the defendants is a breach of the defendants' warranty to perform its services in a reasonably workmanlike manner.

Even in a narrow view of the meaning of "foreseeability", the defendants' position is unsound. "Foreseeability" does not mean that the precise nature of the harm that resulted must be predictable. "Foreseeability" in the law of torts (and certainly in breach of warranty cases) does not equate to prophecy or precognition. Liability is imposed for negligence even though the full extent of the loss could not have been foreseen provided that the damages result from the same physical forces whose existence required greater care than was displayed and are of the same general kind as those that were expectable. *Standard Oil & Gas Co. v. Brown*, 62 F.2d 398 (C.A. 5, 1933), cert. denied, 289 U.S. 728 (1933).

The principle that to warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was such as might or ought to have been foreseen, does not require that an individual charged with negligence should have been able to foresee the injury in the precise form in which it in fact resulted. 41 N.Y. Jur. §33, Negligence; 82 ALR 2d 714; 57 Am Jur 2d, Negligence, §146.

One of the foreseeable consequences of an oil spill, whether in the engine room of a vessel or on deck or in the harbor, is fire. It is not uncommon for a fire to result from an overflow of bunkers. See, *McDaniel v. The LISHOLT*, 155 F.Supp. 619 (S.D.N.Y. 1957), aff'd, 257 F.2d 538 (C.A. 2, 1958), vac., 359 U.S. 26, 79 S.Ct. 602, 3 L.Ed. 2d 625 (1959), on remand, 180 F.Supp. 24 (S.D. N.Y. 1959), aff'd, 282 F.2d 816 (C.A. 2, 1960), cert. denied, 365 U.S. 814, 81 S.Ct. 694, 5 L.Ed. 2d 694 (1961). In the *LISHOLT*, the facts were stated at 155 F.Supp. 620 as follows:

"At about 12:30 A.M. on February 6, 1954 while the M/S LISHOLT was tied up at Dock 6, Balboa Docks, Panama Canal Zone, light diesel oil was pumped from fuel tanks ashore through hoses into the No. 3 starboard double bottom fuel tank of the vessel. At about the time the flow of diesel oil ceased, or 12:45 A.M., oil overflowed out of the sounding pipe of the tank and ignited."

The defendants were "experts". They, if anyone, should have been able to foresee the consequences of an overflow.

## POINT V

### **The District Court's Finding That it Was Chronologically Impossible to Have Completed the Bunkering Operation at 0042 Hours Is Not Clearly Erroneous. (See Point V of Defendants' Brief)**

In the last paragraph of Point V of their Brief, defendants concede that it was chronologically impossible for the bunkering to have been completed by 0042 hours even *if the pumping had been at the maximum rate*. The only way defendants can appear to make it chronologically possible for the bunkering to have been completed is by assuming a pumping capacity *at greater than the maximum rate* of 200 tons per hour (3½ tons per minute).

At trial, the chronological impossibility of the MOBIL TRADER's having completed bunkering by 0042 hours was demonstrated in the course of pumpman Milano's testimony on cross-examination. Figures or specifications previously given in defendants' answers to interrogatories (Ex. 43) had indicated that the maximum capacity of the pumping on the MOBIL TRADER was a delivery rate of 200 tons per hour.

On the re-direct examination of Milano that immediately followed the cross-examination, counsel for defendants sought testimony from pumpman Milano that might have established a greater rate of delivery than 200 tons per hour (thus compressing or shortening the time when bunkering might have been completed).

Mr. Milano then testified as follows (390a):

"Mr. Daly: I have no further questions.

*Redirect Examination*

*By Mr. Juliano:*

Q. Mr. Milano, this figure of 200 tons that Mr. Daly was referring to, that is about 200 tons, is that correct?

A. Approximately, yes.

Q. It could be more, it could be less?

A. It wouldn't be more."

Even taking defendants' figures (pages 34-35 of their Brief) that there was 373.74 tons of bunkers to be delivered at the rate of 3.3 tons per minute, it was chronologically impossible for the bunkering to have been completed by 0042 hours.

If the pump had been operating at maximum capacity from the very inception of the operation at 2250 hours (which it admittedly was not) and there had been no stripping after pumping out No. 1 port tank (each stripping operation takes 2-3 minutes), no manipulation of valves to close off the empty No. 1 port tank and to open No. 3 tanks, port and starboard, and no stripping operation following the conclusion of the pumping of No. 3 port tank and No. 3 starboard tank, the pumping still could not have been completed by 0042 hours. (373.74 ÷ 3.3 = 113.25 minutes; 2250 hours + 113.25 minutes = 0043.25 hours) (See 362a-363a for the times or operations involved in stripping and valve manipulation.)

The defendants also suggest that the relevant times may not have been exact. Undoubtedly, the start of the bunkering was a significant time to be recorded by the MOBIL TRADER's personnel. It was recorded in the delivery receipt prepared by the defendants (Ex. Vol. 15). It is also the time indicated in the report of MOBIL's Marine Counsel White, as the time of commencing delivery (Ex. Vol. 47). White's report was based on interviews several hours after the fire. Thus, by defendants' own records and statements, bunkering commenced at 2250 hours.

The time when Third Engineer Bafaloukes gave the order to the pumpman of the MOBIL TRADER to stop

pumping, can also be established with some precision. Third Engineer Bafaloukos testified that he noted the time the order to stop pumping was given by looking at his watch which he had checked against the clock in the engine room (Ex. Vol. 107).

The time given by Third Engineer Bafaloukos correlates well with the times established by pilot Del Greco. He had left his tug to go to the pier at 0045 hours (Ex. Vol. 317-318). Pilot Del Greco recalled boarding the vessel shortly after 0050 hours (Exhibit 29, first and third pages; see also Ex. Vol. 334). About one-half minute later, the fire broke out (Ex. Vol. 324).

Third Engineer Bafaloukos testified that he gave the order to "stop bunkering" the second time at 0050 hours and that pumpman Milano turned a valve on deck of the MOBIL TRADER (shutting off the supply of oil from the MOBIL TRADER's tanks) but leaving the pump running presumably to blow the line. He (Bafaloukos) then returned to the engine room. Milano at this point presumably called Captain Banks. The facts stated by Bafaloukos correspond closely with the situation described by Pilot Del Greco; shortly after 0050 hours there was no one on the deck of either vessel; the engine on the barge was running and the cargo hose moving or surging, and, about 30 seconds later, there was the fire.

The District Court's finding of chronological impossibility was not the only basis for rejecting Milano's and Bank's testimony concerning the pumping operation.

The testimony of defendants' witnesses Milano and Banks was replete with improbabilities and contradictions. Each man's version of the facts differed in some important respects from the other's; and there were differences between each man's testimony and the version of the facts each had given to MOBIL's Marine Counsel, Mr. White, several hours after the fire. Among the more significant contra-

dictions and improbable statements in Milano's and Banks' testimony are the following:

1. Captain Banks' *total* inability to recollect talking to Marine Counsel White who was aboard the MOBIL TRADER for approximately two hours obtaining detailed information from him and his crewmen several hours after this disastrous fire (326a).
2. Mr. Milano's *almost total* inability to recall conversing with Mr. White except "occasionally" or to recall giving any of the obviously detailed information he gave to Mr. White (363a-364a, 365a-369a).
3. Captain Banks' changing of his deposition after Milano had testified by deposition to conform with Milano's testimony and the denial that he had ever consulted with anyone about this change (328a-329a).
4. Milano's testimony, that he stopped pumping at 0042 hours, coincides with the time of the first order given to stop pumping as stated by the TRADE DARING's personnel and is contrary to Mr. White's report in which it is stated that Milano did not even begin stripping No. 3 starboard tank until 0045 hours (Ex. Vol. 51).
5. Banks' unexplained (12a) alteration of the delivery receipt which, on its face, seems to indicate from the times and the date appearing thereon that it was prepared late in the evening of the day before the fire and before bunkering had been completed (334a).
6. Milano's information to Mr. White that he awakened Captain Banks, contrasted with Banks' denial that he was asleep (327a-328a).
7. Milano's testimony denying that he said anything to Captain Banks except "clean delivery" (378a-379a), while

Captain Banks stated that he was advised by Milano that he was blowing the line (328a).

8. Milano's information to Mr. White that he was given a signal by the Master to stop (Ex. Vol. 51) contrasted with his later testimony (serving to minimize the urgency of the order) denying that he was ever given a signal (376a-377a).

9. Banks' handwritten statement that the MOBIL TRADER was never given an order to stop pumping (Exhibit G of Exhibit 43) contrasted with Milano's testimony that he had been told to stop by the Master (376a).

10. Milano's and Banks' testimony that Milano had shut off the pumping engine at 0042 hours contrasted with pilot Del Greco's testimony that when he boarded the TRADE DARING and looked down on the deck of the MOBIL TRADER, an engine was running and the hose was surging violently (Ex. Vol. 323).

11. Milano's and Banks' testimony at trial concerning starting up the port diesel engine (belatedly tending to explain away Del Greco's prior deposition testimony concerning the running engine he had observed on the MOBIL TRADER seconds before the fire, as discussed, *supra*), although no mention of starting up this engine was ever made previously.

The District Court had ample reason to reject the testimony of Milano and/or Banks, in whole or in part, and its decision to do so was not "clearly erroneous."

## POINT VI

### **Defendants' Argument in Point VI of Their Brief for Upholding the Apportionment of Liability Made by the District Court Fails to Address Itself to the Fact That the Apportionment Was Based on Clearly Erroneous Findings and Fails to Address Itself to the Cases and Authorities Set Forth in Point III of Plaintiff's Opening Brief.**

The District Court expressly held that the decision to diminish the plaintiff's recovery rested on two (and only two) findings of contributory fault: "creating the false expectation" and failure of the plaintiff to train its personnel as evidenced by failure to close the in-take valves in time to prevent an overflow (14a).

As to the finding of "false expectation", the defendants have not only failed to challenge plaintiff's specification of this error (see Point I of plaintiff's opening Brief), they have indeed virtually conceded it (see Point I of Defendant's Reply Brief, *supra*).

The other "alleged faults" that defendants discussed in Point VI of their Brief were not held by the District Court to be contributory or to serve to reduce plaintiff's award of damages (14a).

In any event, in reviewing these facts presented by defendants in Point VI of their Brief, it will be seen that these facts do not substantiate any charge of fault.

While it is true that the Third Engineer of the TRADE DARING had the "ultimate control" of the bunkering operation in the sense that he could "close out" against the bunkering barge, even Captain Banks admitted that this would only be done in an emergency (340a-341a).

The valves at the save-all basins were left open because that is the normal and proper practice, except when the

basins are being flushed or cleaned, as verified by the only person who was qualified to express an opinion (75a).

The Third Engineer would not in normal practice close the valve on the main deck immediately after giving the order to stop bunkering; time had to be given to permit the lines to be blown and to drain, as defendants' witnesses testified (155a).

The Third Engineer did not fail to be at his "post" in the engine room. He had no "post" in the engine room. The vessel was not at sea. He was in charge of bunkering. The vessel was getting ready for sea. The Second Engineer was in the engine room (Ex. Vol. 76).

The Third Engineer did not "fail" to close the valve in the engine room when the overflow was discovered. He immediately advised the Second Engineer who did close the main valve in the engine room while he (the Third Engineer) went on deck to determine the cause of the overflow. The cause of the overflow was not self-evident (Ex. Vol. 76).

The Third Engineer was highly qualified by his experience (see "Facts" in plaintiff's opening Brief at page 12).

It is significant that although defendants launched a massive attack against the fire-fighting efforts of the men of the TRADE DARING via Captain Neal's testimony (Ex. Vol. 361-364), that criticism was thoroughly discredited (276a-288a) and has not even been raised by defendants on this appeal. "All of the actions taken by the crew were proper considering the circumstances and nature of the fire." (19a). The behavior of the personnel of the TRADE DARING under stress of attempting to fight this disastrous fire speaks most eloquently concerning their abilities and qualifications. The technical "faults" that the defendants have attempted to use as a shield against the consequences of their own glaring negligence and breach of warranty seem very insubstantial when placed alongside

the accomplishments of these men working in the very difficult circumstances created by the defendants.

The cases and authorities cited by the defendants in Point VI of their Brief on the question of "comparative negligence" are not in point. Plaintiff does not deny that the doctrine of comparative negligence is applicable in admiralty in a proper case. But the defendants have not even attempted to distinguish or attack in any way those numerous cases cited in Point II of the plaintiff's opening Brief that hold that contributory negligence in "warranty" cases is significant only if the negligence of the warrantee is such as to have actively "hindered" or "prevented" the warrantor from performing his duty.

Defendants suggests at page 37 of their Brief that this is not a "warranty" case but a breach of contract or tort case, as alleged in the complaint. The complaint expressly alleged the breach of the defendants' duty to perform the bunkering "in a reasonably workmanlike manner" (See paragraph 8 of the complaint). In any event, in its statement of the issues or contentions in the pre-trial proceedings, the plaintiff stated:

"45. The loss or damage to the plaintiff's vessel . . . was proximately caused by the negligence and the breach of the defendant's warranties to perform the bunkering operations in a workmanlike manner." (See the "Undisputed and Disputed Proposed Findings of Ultimate Facts.")

The defendants appear to suggest at page 36 of their Brief that whatever the engineering officers' actual experience and ability might have been, the doctrine of "statutory fault," serves to bar plaintiff's recovery here. It is submitted that the doctrine of "statutory fault", as enunciated in *The Pennsylvania*, 19 Wall 125, 22 L.Ed. 148 (1874). is not applicable under the law or facts of this case.

The "Pennsylvania Rule" was the product of collision law and was originally only applied to a violation of the

statutory "Rules of the Road" designed and promulgated to avoid collision. A vessel that has violated a "Rule of the Road" is saddled with the heavy burden of establishing that the accident could not have been a result of the violation. It has been subsequently applied by some courts to other statutory violations. However, the courts refuse to apply the doctrine of "statutory fault" in actions based on breach of warranty of workmanlike service. Undoubtedly, the rationale for not applying this rule is an extension of the rationale for not holding "contributory negligence" a bar to such actions, as noted above.

The Court, in *Garner v. Cities Service Tankers Corporation*, 456 F.2d 476 at page 480 (C.A. 5, 1972) stated:

"We decline to extend the rule of *The Pennsylvania* from its tort origins to the setting of contractual indemnity for breach of WWLP." (Warranty of Workmanlike Performance).

Even in those cases where the doctrine of "statutory fault" (*The Pennsylvania*) is applicable, it has not been applied as a rule of liability. *Garner v. Cities Service Tankers Corporation, supra*, at page 480.

The courts have also refused to construe the rule to mean that every vessel guilty of a statutory fault has the burden of establishing that its fault would not by any stretch of the imagination have had a causal relation to the casualty, no matter how speculative, improbable or remote, *China Union Lines Ltd. v. A. O. Andersen & Co.*, 364 F.2d 769 (C.A. 5, 1966).

The rationale is clear. One who breaches a warranty of workmanlike service should not be given a license to hunt for technical faults on the part of the warrantee that did not prevent the warrantor from performing the agreed service in a workmanlike manner. *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.*, 350 U.S. 124, 134 (1956).

## POINT VII

### **Defendants Are Not Entitled To Be Indemnified Against Plaintiff's Damages Proximately Caused by Defendants' Breach of Warranty of Workmanlike Service. (See Point I of Defendants' Brief)**

The District Court concluded that the indemnity provision in the contract between defendant, Mobil Sales, and third-party defendant, Trade & Transport was, at best, ambiguous and should be construed against indemnifying the defendants for breach of their warranty to their customers to perform their services in a workmanlike manner (14a-15a).

Rules of substantive law applicable to maritime contracts prohibit the interpretation urged by the defendants in Point I of their Brief. Rules or canons for the construction of contracts also militate against the defendants' interpretation of the indemnity provisions of the contract.

Public policy expressed by the admiralty courts is resolutely opposed to a warrantor's insulating itself against liability to its customers for breach of the warrantor's contractual obligations to perform his services in a workmanlike manner. The Supreme Court, in a towage case, *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 75 S.Ct. 629 (1955), stated at 349 U.S. 90-91:

"This rule is merely a particular application to the towage business of a general rule long used by courts and legislatures to prevent enforcement of release-from-negligence contracts in many relationships such as bailors and bailees, employers and employees, public service companies and their customers. The two main reasons for the creation and application of the rule have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains. . . ."

Even in non-maritime cases, the courts hold that a contract of indemnity purporting or claiming to relieve one from the consequences of his failure to exercise ordinary care must be strictly construed. Accordingly, it has been stated that a contract of indemnity will not be construed to indemnify the indemnitee against losses caused by his own negligence unless such intention is expressed in clear or unequivocal terms or unless no other meaning can be ascribed to it. See *Capozziello v. Brasileiro*, 443 F.2d 1155 (C.A. 2, 1971), and cases cited therein at page 1157.

In other words, public policy generally frowns upon contracts which purport to relieve one from the consequences of his own fault. In maritime relationships, such as the one between suppliers of vital services and their customers, such attempts to evade responsibility have been not merely frowned upon but absolutely prohibited.

General canons for the construction of non-maritime contracts serve to defeat the interpretation urged by the defendants.

It is a cardinal canon of construction that in the event of any ambiguity or uncertainty in the intended scope or meaning of language used in a contract, the ambiguity or uncertainty is to be resolved against the party responsible for drawing the contract. The contract in question (Ex. Vol. 310) is a standard form presented to all those seeking the bunkering services of Mobil Sales & Supply Corporation. The application of this principle in these circumstances requires no extensive citation of authority. *Ratigan v. New York Central Ry. Co.*, 181 F.Supp. 228 (N.D.N.Y.) (1960), aff'd, 291 F.2d 548 (C.A. 2, 1961), cert. denied, 368 U.S. 891, 82 S.Ct. 144, 7 L.Ed. 2d 89; 17 Am Jur 2d, Contracts, § 276.

Another well-settled rule of construction is that where the intent of general language in a contract is not clear, the general language should be interpreted in light of the more specific language or specific terms in the contract.

The application of the principle of *noscitur a sociis* and its special application as the principle of *ejusdem generis* require no extensive citation. 17 *Am Jur* 2d, Contracts, § 270.

Turning to the contract in this case, in light of the above principles, certain observations may be made. If the defendants had intended to have the sales contract protect them against their liability to their customers for damage to their customers' vessels, they could easily have used appropriate language.

The contract does not even purport to indemnify defendants against their own "losses" or against "damage" to their bunkering barges. Nor does it refer to damage to the customer's vessel (Ex. Vol. 312). This is consistent with the view that the defendants were seeking protection against suits or claims by third parties and were not providing for protection against claims for losses to the property of the supplier or its customers. The warranty refers only to indemnity "against any claim, action, suit, assessment, fine, levy, penalty or exaction of a like nature" (Emphasis ours) (Ex. Vol. 312).

The most reasonable construction of this ambiguous contract is that it was intended to allow the Seller to obtain indemnity against the Buyer in cases where the Seller might be held fully liable to a stranger to the contract or in violation of anti-pollution laws as a joint tortfeasor or by operation of law.

It is also significant that the indemnity provisions speak solely in terms of damages caused by the fuel oil, as such, that is, in terms of damage caused by "leakage, spillage, overflow or . . . pollution", and not fires (Ex. Vol. 312). Defendants in their Brief at page 17 refer to fuel oil as "a dangerous commodity" and argue that fires must have been intended to be included within the coverage of the indemnity provisions. A more reasonable interpretation would be that if such disastrous consequences were in-

tended to be included, they should have been specifically mentioned.

The defendants at pages 18 *et seq.*, of their Brief indicate heavy reliance on the case of *Levine v. Shell Oil Company*, 28 N.Y. 2d 205, 321 N.Y.S. 2d 74, 269 N.E. 2d 787 (1971).

The meaningful distinctions between the holding in the *Levine* case and this case are many:

1. The Court in *Levine* was not faced with a public maritime policy against warrantors of workmanlike service relieving themselves from liability to their customers for the warrantors' own negligence or breach of warranty. *Bisso v. Inland Waterways, supra.*
2. In *Levine*, the state court expressly acknowledged that it was departing from precedent. 28 N.Y. 2d at 211. Most jurisdictions follow the stricter rule of construction. 41 *Am Jur* 2d, *Indemnity*, §15.
3. The language of the indemnity clause in *Levine* was significantly broader than in this case. The language there included: "any and all claims, suits, *loss, cost* and liability on account of *injury* or death of persons or *damage to property . . . caused by or happening in connection with . . .*" 28 N.Y. 2d at 210.
4. The indemnity provisions in the *Levine* case were not, as here, narrowly directed toward specific types of occurrences "leakage, spillage, overflow or . . . pollution."
5. The facts in *Levine* constituted a true indemnity case, that is, it involved a claim for reimbursement or indemnification for liability to strangers to the contract. It was not raised, as here, as a shield by a warrantor for the warrantor's own breach of its warranty of workmanlike service to its warrantee.

6. There is no indication that the contract in *Levine* was a form contract provided by a party on whom the other party was dependent for the continued operation of his business.

Several of the above-listed distinctions between the *Levine* case and the case at bar were noted in a subsequent case involving somewhat similar—and even stronger—indemnity provisions. The Court held that indemnification provisions did not avail the indemnitee any relief for its own wrong against the injured party.

In *Redding v. Gulf Oil Corp.*, 67 Misc. 2d 464 (Sup. Nassau 1971), the plaintiff brought an action against his lessor (Gulf) in negligence to recover damages for injuries allegedly sustained by reason of a defective piece of equipment. Gulf, in a third-party action and plaintiff in a separate action, sued the manufacturer of the allegedly defective equipment. After these actions had been joined for trial, Gulf brought a fourth-party action against Redding, alleging that if it were held liable in damages to Redding then he would be obliged to indemnify Gulf by reason of the following indemnification provision:

“Lessee agrees to exonerate, save harmless, protect and indemnify Lessor from any and all losses, damages, claims, suits or actions, judgments and costs which may arise or grow out of any injury to or death of any person or persons or damage to any property caused by or in any manner connected with the use, possession, repair or condition of said premises or any equipment or fixtures thereon.” *Redding, supra*, at 465.

The fourth-party action was the matter to be decided by the Court.

The Court found the *Levine* case relied upon by Gulf inapplicable and held that Gulf could not recover from Redding based upon the aforesaid indemnification provision. The Court stated as follows at pages 466-467:

"In *Levine* the court said (p. 211) that 'one who is actively negligent has no right to indemnification unless he can point to a contractual provision granting him that right' and 'courts have carefully scrutinized these agreements for an expression of an intent to indemnify and for some indication of the scope of that indemnification.' The court continued: 'This rule appears to be premised upon the view that where a person is under no legal duty to indemnify, his contract assuming that obligation must be strictly construed (*Kurek v. Park Chester Housing Auth.*, 18 N.Y. 2d 450, 456).'"

\* \* \*

Applying these principles we seek in vain for language in the clause which indicates an intention to include injury to the lessee.

"It [Gulf] prepared the expression of the parties' agreement. If it desired indemnity against injury to the lessee, some expression of that intention should have been inserted. As the clause is written it refers to the parties as lessor and lessee and it must be held that the indemnity was against liability to person or persons other than themselves."

\* \* \*

"We hold, therefore, that this clause may not be read to excuse Gulf from active negligence causing injury to its lessee in the absence of language showing such an intention. Mindful of the caution given to us in *Levine* and in *Kurek* (p. 456) that these clauses should not be construed as to make them meaningless we are not saying that the intent must appear in unequivocal language or 'express terms' (cf. *Ciofalo v. Vic Tanney Gyms*, 10 N.Y. 2d 294, 297) but we find the requisite 'unmistakable intent' absent from the agreement here (*Levine v. Shell Oil Co., supra*, p. 212)."

The Appellate Division of the Supreme Court of the State of New York, Second Department, affirming the de-

termination of the Court below at 38 A.D. 2d 850 (1st Dept. 1972), stated as follows at page 852:

"Levine stands for the proposition that, where a third party sues the landlord oil company for its active negligence, the tenant station operator may be required to respond under the indemnification clause. At bar, the question of the agreement's validity under the statute is squarely raised and it was the lessee himself, not a third person, who was injured. Hence, we deem *Levine* distinguishable and not controlling."

Accord, *McLean v. L.P. W. Realty Corp.*, 507 F.2d 1032 (C.A. 2, 1974); *Hogeland v. Sibley, Lindsay & Curr Co.*, 51 A.D. 2d 866 (4th Dept. 1976).

The indemnity clause in *Redding* was even stronger than the one in the case at bar. In *Redding*, the indemnity purports to cover "any and all losses, damages, claims . . ." (Emphasis ours); in the case at bar there is no provision to cover "losses" and "damages", it only indemnifies against claims etc. arising from specific causes: "leakage, spillage, etc."

The defendants conclude their Brief at page 21 with the peroration: "To have contracted otherwise would have left it or its supplier without protection against potential claims for vessel damage." The short answer to this argument is another question: Why should Mobil Sales be permitted to insulate itself from the consequences of its own breach of duty to its customers to perform its services in a reasonably workmanlike manner?

Plaintiff is not seeking to hold defendants liable for damage proximately caused by anyone other than the defendants.

## CONCLUSION

The defendants have virtually conceded that the District Court's findings of contributory negligence used by the District Court for reducing plaintiff's damages are without foundation in the evidence. These findings are, indeed, contradicted by the testimony of the defendants' own witnesses and by unrebutted evidence (Point I, *supra*).

The defendants' argument that the TRADE DARING was in violation of classification society standards and that such violation constituted a "proximate intervening cause" of the casualty is contrary to the findings of the District Court made on the basis of testimony of witnesses at trial. These findings of the District Court were not "clearly erroneous" (Points II and III, *supra*).

The defendants' argument that their pumpman's failure to stop pumping was not the cause of the casualty is contrary to the findings of the District Court based on admissions of defendants' witnesses at trial and on undisputed facts. The findings of the District Court were not "clearly erroneous" (Points IV and V, *supra*).

Defendants' argument attempting to support the District Court's holding of 75% contributory negligence against the plaintiff is undercut not only by defendants' virtual concession (Point I, *supra*) of plaintiff's specification of errors, but also by their failure to distinguish or dispute the cases cited by plaintiff holding that contributory negligence of the character alleged here is not a bar to full recovery. *Henry v. A/S OCEAN*, 512 F.2d 401 (C.A. 2, 1975) (Point VI, *supra*).

Defendants' argument that they are entitled to indemnity against the TRADE DARING's agent for the damages to the TRADE DARING proximately caused by defendants' own negligence is not warranted by the language of the contract and is contrary to law. *Bisso v. Inland Water-*

*ways Corp.*, 349 U.S. 85 (1955); *Redding v. Gulf Oil Corp.*, 67 M.2d 464 (Sup. Nassau 1971), *aff'd*, 38 AD 2d 850 (1st Dept. 1972) (Point VII, *supra*).

WHEREFORE, it is respectfully submitted that the decision and order appealed from by plaintiff herein should be modified by adjudging the defendants liable for all damages sustained by the plaintiff without reduction or apportionment.

Respectfully submitted,

POLES, TUBLIN, PATESTIDES & STRATAKIS  
*Attorneys for Plaintiff-Appellant-Appellee*  
*Navieros Oceanikos, S.A. and Third Party*  
*Defendant-Appellee Trade & Transport Inc.*

THEODORE P. DALY  
ALAN VAN PRAAG  
*Of Counsel*

2  
SERVICE OF THREE (3) COPIES OF THE WRITING

IS HEREBY ADMITTED

THIS 5 DAY OF *Jan* 1976

COPY RECEIVED

JAN 5 - 1977

Bigham, Englar, Jones & Houston

Attorney(s) for

A.F.